

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**

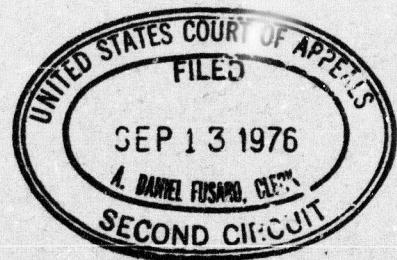




76-6084

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DOCKET NO. 76-6084

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

JOHN W. FITZGERALD

Plaintiff-appellant

V.

DONALD R. DEVARNEY, individually  
and in his capacity as Postmaster  
of the Post Office in Milton, Vermont;  
ELMER J. KLASSEN, individually and  
in his capacity as Postmaster General  
of the United States Postal Service;  
RAYMOND A. GORDON, individually and  
in his capacity as a Rural Carrier  
with the Post Office in Milton, Vermont  
and THE UNITED STATES POSTAL SERVICE,  
an independent establishment of the  
Executive Branch of the Government  
of the United States

Defendant-appellee

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Appeal from the United States District  
Court for the District of Vermont

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APPELLANT'S REPLY BRIEF

NANCY E. KAUFMAN  
RUBIN & SILVERMAN  
PLAINFIELD, VERMONT

## TABLE OF AUTHORITIES

### CASES

Boston & Maine Railroad v. Bentubo  
160 F. 2 d 326 (1st Cir. 1947)

Cord v. New York Cleaning and Dye Works, Inc.  
88 F. Supp. 704 (D. Conn. 1948)

Helton v. Mercury Freight Lines  
447 F. 2 d 365 (5th Cir. 1971)

Levine v. Berman  
178 F. 2 d 640 (7th Cir. 1949) cert denied 339 U.S. 982 (1950)

Loeb v. Kiv8  
77 F. Supp. 523 (S.D.N.Y. 1947) aff'd. 169 F. 2 d 346 (2nd Cir. 1948)

MacKnight v. Twin Cities Broadcasting Corp.  
13 L.C. 719 96 (D. Minn. 1947)

Major v. Phillips-Jones Corp.  
192 F.2 d 186 (2.d Cir. 1951) cert denied 343 U.S. 927 (1952)

O'Mara v. Pelersen Sand & Gravel Co., Inc.  
498 F. 2 d 896 (7th Cir. 1974)

### AUTHORITIES

Legal Guide and Case Digest  
Veterans' Reemployment Rights, U.S. Department of Labor

U.S. Department of Labor, Veterans' Reemployment Rights  
Handbook, (1970)



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IN THE  
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FOR THE SECOND CIRCUIT

JOHN W. FITZGERALD,  
Plaintiff-appellant

v.

DONALD R. DEVARNEY, et.al.,  
Defendant- appellee

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No. 76-6084

APPELLANT'S REPLY BRIEF

INTRODUCTION

Defendant's brief has raised certain points with respect to the four issues raised by the plaintiff on appeal which require reply. Where the appellant FitzGerald does not reply, he is satisfied that his original brief is sufficient to respond to the arguments advanced by the Appellees (hereinafter referred to as "the Postal Service"). The central dispute continues to revolve around the authority and duty of the District Court to assess and award damages. FitzGerald's right to restoration to his post in Milton also continues to be disputed.

In his reply brief, FitzGerald will reaffirm that (1) the District Court had a duty to assess and award damages, (2) that



the Court committed error in its calculation of damages, and (3) that the District Court committed an abuse of discretion by not restoring FitzGerald to his post as rural carrier in Milton, Vermont.

#### ARGUMENT

##### I. THE DISTRICT COURT HAS A DUTY TO ASSESS AND AWARD DAMAGES.

The Postal Service has claimed in its brief that the District Court judge, under the relevant statutes of this case, has discretion in determining whether to award damages, even in circumstances where the plaintiff has demonstrable losses. Appellees' Brief, 5. The Postal Service goes so far as to argue that "special circumstances" must be proved to exist in order to support an award of damages. Appellees' Brief, 9. Appellees cite, inter alia, the cases of Boston and Maine Railroad v. Bentubo, 160 F.2d 326 (1st Cir. 1947), Levine v. Berman, 178 F.2d 440 (7th Cir. 1949), cert denied 339 U.S. 982 (1950), and O'Mara v. Petersen Sand & Gravel Co., Inc., 498 F.2d 896 (7th Cir. 1974) to support their claim. Appellees' Brief, 5-6.

The courts have long made clear that a serviceman is entitled to be made whole upon his return from military duty to his prior employment. Loeb v. Kivo, 77 F. Supp. 523 (S.D.N.Y. 1947) aff'd 169 F.2d 346 (2d Cir. 1948).

In fact, the veteran could choose to sue simply for lost wages and forego suit for restoral to his position. Supra. 529.

The cases cited by the Postal Service are not to the contrary. In Boston & Maine Railroad v. Bentubo, supra. the First Circuit upheld the right of the lower court to mitigate the damages suffered by the employee with wages earned from other employment, not to refuse to award damages altogether. As pointed out in Appellant's main brief, page 13, some courts had held that the Act foreclosed the dimunition of the award for lost wages and benefits by earnings from other employment. The Bentubo court did, however, recognize the remedial nature of the act, which was designed to protect the veteran's right to lost wages. Supra. 328.

In Levine v. Berman, the Seventh Circuit upheld the denial of claimed lost wages because fraudulent representations of the claimant vitiated the claim for damages. In a more recent case, the Seventh Cirucit, reversing a lower court ruling, upheld the right of the claimant to a hearing on damages from lost wages. Particular emphasis was laid by the Court on the fact that this Selective Service Act was "to be construed liberally so as to benefit the veteran." Supra. 898. Thus, even where the employer has acted in good faith, the serviceman is entitled to compensatory damages.

Legislative history of the Act does not dispute these Court holdings. By referring to the Congressional Record



cited by the Appellees, at page six of their Brief, the Court will discover that the purpose of the Act was to perform a "simple act of justice", i.e. to compensate the veteran for wages lost in his/her effort to obtain restoral of his/her job. Cong. Rec. 11031 (1940). In addition to the language cited in appellees' brief at page six, Senator Wagner went on to explain that during the interim period in which the veteran was attempting to obtain restoral of employment through a law suit, the amendment that he sponsored would provide that "the individual shall also have the wages lost <sup>period of the proceedings</sup> during the/in court. Supra.

FitzGerald submits that where the veteran demonstrates lost wages, the court must award him damages. The question then becomes that of whether FitzGerald has suffered loss in wages and benefits.

Appellees' brief continues to promote the assertion made by the Postal Service at trial that FitzGerald is attempting to include earned National Guard wages as part of his damages. This claim is an error. In fact, it is the Postal Service, not Mr. FitzGerald, which is attempting to claim the benefit of the National Guard pay. There is no dispute in the record that FitzGerald performed compensated National Guard duty while employed by the Postal Service. It is also contradicted by any evidence that FitzGerald was employed only part time by the National Guard upon the Postal Service's



refusal to reinstate him, and that for the balance of the period, FitzGerald performed precisely the same Guard duties undertaken when he was a Postal Service employee. Appendix, pp. 90, 98, 106-108, 170-174.

Therefore, by asking the court to consider wages which FitzGerald would have earned if employed by the Postal Service, Appellees are asking the court to accord to them the financial benefit of earnings FitzGerald would have enjoyed in any event. It is this precise result which was rejected as unfair by the federal courts in Halton v. Mercury Freight Lines, 444 F. 2d 365 (5th Cir. 1971) and MacKnight v. Twin Cities Broadcasting Co., 13 L.C. 71996 (D. Minn. 1947).

The Postal Service relies heavily on Cord v. New York Cleaning & Dye Works, Inc., 88 F. Supp. 704 (D. Conn. 1948) for authority that part time wages can be considered in mitigation of damages. The reasoning of the Cord case, however, upholds FitzGerald's position. This case concerned a returning veteran, who expanded his vending machine business upon his illegal discharge from his employment. The court found that, after his discharge, the claimant had the capability and did take over the entire business, buying out his partner. The clear implication was that the claimant commenced doing full time work that could not have been performed if he had not been discharged by his employer.

Moreover, in denying damages, the court pointed to in-



sufficient evidence "to determine what portion of [total profits and salaries] was earned by plaintiff's day-time work but would have been earned under the old part-time basis." Supra. 706. Thus it appears that the court would have excluded as part of mitigation, if the evidence so supported, those earnings which the claimant would have enjoyed if he had retained his job. There is no claim here that FitzGerald did not set forth those Guard earnings which he would have earned while employed by the Postal Service. Thus, he submits that reversal of the lower court's order respecting damages is required.

This same result would be indicated if this Court reviews the Veterans' Reemployment Rights Handbook, issued by the Department of Labor, 1970, and relied upon as authority in the Appellees' Brief at page 22. In this handbook, the Department of Labor unequivocally states that the damages to be awarded under the act are to be calculated so as to make "the veteran financially whole for the losses he sustains by reason of the employer's failure to comply." Supra. 131. Moreover, the handbook points out that damages are subject to mitigation from that employment which the veteran took as a substitute for the wrongfully denied position. Supra. 132. The handbook goes on to state that earnings from extra work may not be considered as mitigation. Supra. 133. As stated in the Appellant's Brief, the handbook



assigns the burden to the employer to prove the inadequacy of the veteran's substitute employment, supra. 132, a burden not met in the instant case.

Finally, the handbook defines a method of calculating damages not followed by the lower court:

Mitigation of damages should be computed separately for each pay period. For example, if the veteran, in his mitigating employment, earns more in one pay period than he would have earned from the obligated employer if properly reinstated, but less in another pay period, the excess in the former does not offset any of the shortage in the latter. Supra. 133. See example 4 at pp. 134-135.

As can be seen from the testimony and exhibits, there were periods during the time in question in which Mr. FitzGerald had no earnings. Appendix, pp. 97, 156, 170-174. Consequently, the lower court committed error, at the very least, by refusing to compute damages pay period by pay period. Such a computation would have resulted in compensation to FitzGerald for those periods in which he either earned nothing or less than postal service wages. See also Legal Guide and Case Digest, Veterans Reemployment Rights, U.S. Department of Labor, "Damages", pp. 107-109.

FitzGerald submits that the district court had a duty to assess and award damages owed to him by the Postal Service resulting from its refusal to reinstate him. He further submits that an appropriate calculation of damages would exclude earnings resulting from Guard work he performs on a part time basis whether or not he is employed by the Postal Service.



II. APPELLANT IS ENTITLED TO COMPENSATION FOR LOST OVERTIME

FitzGerald contends that this point is essentially conceded in the Appellees' Brief at page 22. The overtime amounts earned in FitzGerald's old position are readily available and not speculative since his rural mail route remained in existence during the period he was denied reinstatement.

III. APPELLANT IS ENTITLED TO COMMUTING COSTS, COURT COSTS, AND ATTORNEY'S FEES.

At page 25 of its brief, the Postal Service argues that defendant could have been represented by a United States attorney and is therefore precluded from an award of attorney's fees. Mr. FitzGerald was refused representation by the United States Attorney.

IV. APPELLANT IS ENTITLED TO RESTORAL TO HIS POSITION IN MILTON, VERMONT.

The Postal Service relies on Major v. Phillips-Jones Corp., 192 F. 2d 186, 188 (2d Cir. 1951) cert. denied 343 U.S. 921 (1952) for authority that the Postal Service is not required to restore FitzGerald to his exact position. In the Major case, the employer consistently offered the veteran a superior position at greater pay and located closer to home. Supra 188. Restoral of the veteran would have required an "extensive change of territory." Supra 187. The veteran was further offered the



opportunity to return to his former territory at a later date.

Supra. Under these circumstances, the court found that the employer had acted reasonably.

In the present case, the Postal Service refused to restore FitzGerald to any position. No evidence is on the record to support a refusal to restore FitzGerald to his former position. Mr. FitzGerald was precluded by the proceedings at trial from demonstrating the inadequacy of the position offered by the Postal Service, which he now claims is inferior in terms of pay, seniority, and status. The implication of the Major case seems to be that under the circumstances the Postal Service has failed to meet its burden of demonstrating the impossibility of returning FitzGerald to his Milton position.

Appellees also argue that this Court should withhold decision because the Civil Service has jurisdiction over this claim. Appellees' Brief, pp. 27-28. While Mr. FitzGerald has pursued his claim before the United States Civil Service Commission, Harry Grossman, Chief Appeals Officer, has informed FitzGerald by letter dated August 11, 1976 that no oral argument will be heard on his claim. Moreover, the avenue for relief from error committed by the district court is by an appeal to this court. The trial judge cannot preclude this relief by entering an order which refers Mr. FitzGerald to the Civil Service Commission. Appellant therefore requests this Court to reverse the holding of the district court and to order the Postal Service to reinstate FitzGerald to his original post, with all accrued rights and benefits.



CONCLUSION

Reversal of the lower court's rulings with respect to damages and reinstatement to other than Mr. FitzGerald's Milton, Vermont, post is requested for the reasons stated above.

Respectfully submitted,

Nancy E. Kaufman  
Nancy E. Kaufman

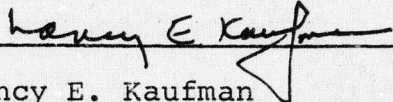
ATTORNEY FOR THE APPELLANT



Certificate of Service

Nancy E. Kaufman, hereby certifies that on the 10th day of September, 1976, she served by First Class mail two copies of Appellant's Reply Brief on Richard A. Levin, Esq., Office of Labor Law, U.S. Postal Service, 476 L'Enfant Plaza, Washington, D.C. 20260.

Dated at Plainfield, Vermont this 10th day of September, 1976.

  
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Nancy E. Kaufman  
APPELLANT'S ATTORNEY